

Commentary: Appellate Court Cases

Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010)

Other First Circuit Cases

Mendez v. May,
778 F.3d 337 (1st Cir. 2015)

Sánchez-Londoño v. Gonzalez,
752 F.3d 533 (1st Cir. 2014)

Neergaard-Colon v. Neergaard,
752 F.3d 526 (1st Cir. 2014)

Darin v. Olivero-Huffman,
746 F.3d 1 (1st Cir. 2014)

Yaman v. Yaman,
730 F.3d 1 (1st Cir. 2013)

Patrick v. Rivera-Lopez,
708 F.3d 15 (1st Cir. 2013)

Felder v. Wetzel,
696 F.3d 92 (1st Cir. 2012)

Charalambous v. Charalambous,
627 F.3d 462 (1st Cir. 2010)

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008)

Rigby v. Damant,
486 F.3d 692 (1st Cir. 2007)

Whallon v. Lynn,
356 F.3d 138 (1st Cir. 2004)

Walsh v. Walsh,
221 F.3d 204 (1st Cir. 2000)

Toren v. Toren,
191 F.3d 23 (1st Cir. 1999)

Zuker v. Andrews,
181 F.3d 81, Unpublished Disposition,
(1st Cir. 1999)

Consent and Acquiescence

Article 13 establishes a defense to return when the left-behind parent has consented or acquiesced to the removal or retention of the child. Consent or acquiescence, however, must be clearly established.

Facts

Mother left Australia with her three-month-old child and settled in Maine. Two months later, mother applied for a temporary protective order giving her temporary custody of the child, and father was granted limited visitation. Father consented to the order. Meanwhile, father had made application for return of the child in federal court. The district court found that father had neither consented nor acquiesced in the wrongful removal of the child from Australia and ordered the child returned. The First Circuit affirmed.

Discussion

Mother argued that father had acquiesced in her taking the child from Australia to the United States. However, his subjective intent to do so was vitiated when he filed an action in federal court for the return of the child. The First Circuit noted that the execution of a state custody order permitting a state court to make a final custody order would be tantamount to acquiescence under the 1980 Convention, citing both domestic and foreign precedent. In this case, however, the order secured by mother was in the context of a

temporary protective order; this order contemplated the possibility that another court would take jurisdiction of the case. The court found that father did not give clear and unambiguous consent to have Maine courts make a final custody determination.

Father could have stayed the hearing of any temporary custody case because of the pendency of his Hague Convention proceeding in federal court. Article 16 of the Convention prohibits a court from proceeding on a custody determination, even a temporary one, when a petition for return of a child is pending. A temporary order of limited duration was insufficient to establish that, as a matter of law, father acquiesced in the removal of the child from Australia.